In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4360

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington, for the United States Government, Appellant

vs.

MON HIN, Appellee.

Appeal from the United States District Court for the Western District of Washington, Northern Division.
Honorable Jeremiah Neterer, Judge

Brief of Appellant

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STATEMENT OF THE CASE.

On June 4, 1924, the petitioner, Mon Hin, arrived at Seattle, Washington, and applied for admission to the United States as the stepson of Li Sing, an American citizen. The petitioner is eighteen years of age and has a wife and son in China. He testified that his occupation prior to his application for admission was that of delivering goods

for a drug store, when not attending school. Li Sing, his stepfather, was born in the United States and is therefore an American citizen, although of Chinese blood. He has always lived in the United States except for a trip to China in 1921, when he married Wong Shee. The petitioner is the son of Wong Shee by a former marriage.

Li Sing, the petitioner's stepfather, testified that he is engaged in the buying, drying and exporting to China and Canada of shark's fins, terrapin fish, etc., at Fernandina, Florida, under the name of Mee May Jan Company, stating that he was the manager, buyer and shipper of this company; that he had about Two Thousand ($2000) Dollars invested in the business, and that he did all the manual labor connected with the buying, drying, preparation, selling and shipping of the shell fish, with the exception of hiring a man occasionally to help pack the fish. He states that he has one partner who has a similar investment in the business; that they kept no stock books, nor papers, and operated simply under a license from the state capitol of Florida, for buying and shipping shell fish. The volume of business transacted during the past year amounted to Three Thousand ($3000) Dollars.

In addition to the buying and selling of shell fish, Li Sing owns a laundry operated in the same building where he dries the fish. The laundry is operated by his wife and himself. He states that he sometimes spends one or two hours a day in the laundry. This participation in the laundry work by Li Sing is confirmed by the testimony of a colored woman employee of the laundry.

The premises occupied by Li Sing are stated by the Immigration Inspector at Jacksonville to consist of a two story frame building, the first floor being occupied by the laundry, and the second floor being used for drying shark fins. There are also some out buildings where the Inspector found one thousand live terrapins. It appeared that the shipments which Li Sing made occurred about once every two or three months. It also appeared he purchased from five to forty-five pounds of shark fins about every other day, and from one to seventy-five terrapins about once a week.

ASSIGNMENTS OF ERROR.

I.

The court erred in holding and deciding that the petitioner, Mon Hin, did not have a fair and impartial trial before the Inspector of Immigration conducting his hearing.

II.

The court erred in holding and deciding that a writ of *habeas corpus* be awarded to the petitioner herein.

III.

The court erred in holding, deciding and adjudging that the petitioner, Mon Hin, be discharged from the custody of Luther Weedin, as Commissioner of Immigration at the port of Seattle, Washington.

IV.

The court erred in deciding, holding and adjudging that the petitioner, Mon Hin, was not subject to exclusion and deportation, but was entitled to come in and remain in, the United States.

ARGUMENT.

Mon Hin Is Inadmissible to the United States as the Chinese Stepson of an American Citizen of Chinese Descent.

No claim is made that Mon Hin is other than a laborer. In fact he testified that his occupation, prior to his application, was that of delivering goods for a store. He is therefore, not entitled to enter the United States under the Chinese Exclusion Laws (C. S. 4290 *et seq*), unless he comes within an exemption. The new Immigration Act of 1924 can not be considered, since the application for entry took place before July 1, 1924.

It is true that the courts have held that the minor children, both adopted and natural, of Chinese merchants lawfully domiciled in the United States are admissible.

U. S. v. Gue Lim, 176 U. S. 459;
U. S. v. Fong Yim, 134 Fed. 938.

But the wife and minor children of a Chinese laborer domiciled in the United States are not admissible.

Yee Won v. White, 256 U. S. 399.

As indicating the intent of Congress in passing the Exclusion Laws, it was stated in the Yee Won case:

"Exclusion of Chinese laborers, with certain definite, carefully guarded exceptions, was a manifest end in view, and for a long time the same design has characterized legislation by Congress. In the opinion of the Government of the United States, the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof."

The Yee Won case further pointed out that the Gue Lim case allowing the entry of minor children of Chinese merchants turned upon the meaning of Section 6 of the Act of July 5, 1884, which statute required a certificate, and the conclusion was that this section would not be construed to exclude the wife of a Chinese person, other than a laborer, since this would obstruct the plain purpose of the Treaty of 1880, which permits the free entry of merchants.

The cases of applications for entry of minor children of American citizens of Chinese descent have not received the attention of the courts, except in a few instances. There is a case, however, which Your Honors decided on August 6, 1923, *White v. Kwock Sue Lum*, 291 Fed. 732, which is almost exectly in point. In this case, Kwock Sue

Lum, a member of the Chinese race, was granted a writ of *habeas corpus* after he had been denied admission to the United States. He was the adopted son of an American citizen of Chinese descent. His foster father was a laborer, being engaged in the restaurant business. The petitioner had been adopted by his foster father at the age of two years, and was seventeen years old at the time of his application for entry. He was married and his wife remained in China. The court said:

"He does not claim citizenship by reason of his adoption, nor does he predicate his right to enter upon his own personal status. His reasoning is that by his adoption he and Kwock Toy became clothed with all the rights and privileges implied in the relation of father and minor child, including the right of dwelling together and of the intimate association of a common home."

The court further states that it has long been the settled policy of the Government, generally, to limit Chinese immigration, and particularly to prohibit the entry and residence of Chinese laborers, and quoted from the Yee Won v. White case *supra.* The order granting the writ of *habeas corpus* and releasing the petitioner was reversed, the court saying:

"The admission of appellee would undoubtedly constitute a clear exception to this well-defined national purpose, not only because of the status of his adoptive father, but because presumably he is in fact a laborer. While technically under the laws of this country, still a minor, he is measurably mature, and apparently with the sanction of the laws of his own country he is the head of a family. It is not pretended that he is a merchant, or that he belongs to any of the exempt classes, and to admit him would be to add to the number of Chinese laborers in the United States. As already suggested, if an exception be made in his favor, it must be because of the citizenship of his adoptive father. The power to exclude alien relatives of a citizen is not open to doubt. In Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165, a member of an excluded class was deported, though the wife of a citizen.

"It is then a question of legislative intent, and, no applicable exception having been expressed, upon what ground is one to be presumed or implied? True, we may take cognizance of the natural desire of father and child generally to live in close association one with the other; but even that consideration is much weakened in the instant case. Appellee was born and reared and married in China, all while the adoptive father continued to reside in the United States. Under such circumstances, now to deny admission would not appear to be so harsh and unnatural as to raise the presumption that Congress could not have intended such a result. In the Yee Won case, *supra*, the petitioner

was lawfully in this country. While the source of the right to reside here was different from that of the appellee's adoptive father, still it was a right, and as such was entitled to be respected and protected. The relationship between him and his wife and young children, whom he sought to bring in, in order that they might reside with him, may be assumed to be quite as tender and sacred as that between appellee and his adoptive father. But that consideration was not thought to warrant reading an exception into the general prohibition of the law, the court saying:

" 'Our statutes exclude all Chinese persons belonging to the class defined as laborers, except those specifically and definitely exempted, and there is no such exemption of a resident laborer's wife and minor children.'

"If we exclude the wife and children of Yee Won, a lawful resident, there would seem to be no possible ground for the admission of appellee's family. To admit him, therefore, would be to give heed to his supposed desire to be with his adoptive father, and to disregard the more tender ties binding him to his lawful wife and the infant child of his blood. We cannot think that the citizenship of the adoptive father warrants a construction attended with such a result."

The facts in the case just quoted from closely resemble the facts in the instant case. In both cases, the petitioners, while technically under our laws minors, were measurably mature and

heads of families. In both cases the families are being left behind in China, and no provision of law could allow the entry of their families. It is true that in the Kwong Sue Lum case, *supra*, the foster father was engaged in the restaurant business, and hence is a "laborer," according to the opinion of the court, but the case does not turn on this fact, and it would appear that the same result would have been reached had the foster father been a merchant. The case stresses the labor status of the petitioner and that is exactly the situation in the present case.

In both cases the petitioner is other than the blood son of the American citizen to whom relationship is claimed, as a basis for entry. The status of adopted son and stepson is so similar that both cases should logically receive the same treatment. If an adopted son is excluded, the court cannot consistently admit a stepson. Furthermore, if the court does allow the entry of stepsons, it will encourage many native Americans of Chinese descent to go to China and enter into marriages of convenience with widows having a number of sons. While, of course, there is nothing particularly criminal in such a procedure, nevertheless it is an easy method whereby large numbers of Chinese

laborers can be brought into the country, contrary to the expressed intent of Congress excluding them.

The petitioner here, Mon Hin, attempts to bring in the mercantile character of his stepfather, and appears to claim that he partakes of the same status as his stepfather, namely, that of a merchant, and hence is admissible as such. This is not the claim on which he bases his right of admission, to-wit: as the stepson of a native. His actual status is, of course, that of a laborer. He is to all appearances a man and has reached a man's estate, and is head of a family. The fact that he is married and has a wife in China does not affect his right to admission.

Wo Hoo v. White, 243 Fed. 541.

Assuming for the sake of argument that his stepfather is a merchant, to present him with a mercantile status merely by reason of his relationship by marriage is ridiculous. To allow the petitioner entry under such a fiction would present the spectacle of an American citizen obtaining the entry of a Chinese laborer under an exemption which only belongs to an alien, and as pointed out by the opinion of the Board of Review, such a claim is without foundation or precedent in law. Li Sing is

a *citizen*, and the case must be decided as though any American citizen, you or I, for example, were attempting to bring in a Chinese laborer, who by reason of marriage or adoption claims relationship. Should the fact that the young man has been adopted give him an exemption under the Exclusion Laws? This court has already answered this question in the negative. Certainly it will not make the anomalous and inconsistent holding that he is admissible by reason of his position as the stepson, rather than the adopted son, in view of the fact that the exemption has been created for and exists only in favor of aliens. Li Sing is *not* an alien, and therefore it is unnecessary to consider whether he is or is not a merchant.

IN THE EVEHT THAT IT BECOMES NECESSARY TO CONSIDER THE MERCANTILE STATUS OF THE PETITIONER'S STEPFATHER, IT IS SUBMITTED THAT THE COURT HAS NO JURISDICTION TO PASS UPON THE FINDING OF FACT BY THE BOARD OF SPECIAL INQUIRY TO THE EFFECT THAT THE STEPFATHER IS NOT A MERCHANT.

Judge Neterer, in his opinion, overruled the finding by the Board of Special Inquiry to the effect that Li Sing was not a merchant, and in effect, decided that the petitioner did not have a fair trial, and was therefore entitled to a writ of

hebeas corpus. It is submitted that, under the record, there is no arbitrary element present in the action of the Board of Special Inquiry, and that the court exceeded its jurisdiction in reversing the findings of the Immigration officers charged with this investigation under the Immigration laws.

Section 2 of the Act of November 3, 1893 (Compiled Statutes 4324), provides:

"The words 'laborer' or 'laborers' wherever used in this act, or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying or otherwise preserving shell or other fish for home consumption or exportation.

"The term 'merchant' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

An examination of the record in this case shows, without a doubt, that Li Sing, the petitioner's father, spends a great part of his time in the

laundry and in drying fish. Shipments of fish only occur about once every two or three months, and the purchases require very little time. By Li Sing's own admissions, it is shown that he works in the laundry sometimes one or two hours a day. His wife, Wong Shee, states that he helps her in the laundry and the testimony of every other witness is to the effect that he works in the laundry at least to some extent. It seems clear that Li Sing does manual labor which is not necessary in the conduct of his alleged business as a fish merchant, and therefore he cannot be a merchant within the terms of the statutory definition quoted above. Your Honors' attention is called to the fact that "any manual labor" which is not necessarily involved in the conduct of his alleged business as a fish merchant is sufficient to disqualify under the statute.

It is further submitted that Li Sing has failed to prove his mercantile status in respect to his business as a fish merchant. The statute quoted above expressly provides that Chinese employed in fishing, including "those engaged in the taking, drying, or otherwise preserving shell or other fish for home consumption or exportation" are laborers. According to Li Sing's own testimony, he does all the

manual labor connected with the buying, drying, preparation, selling and packing of the fish, with the exception of occasionally hiring a man to help with the packing. The buying and selling occupies a small portion of his time, in comparison with the labor involved in drying and preparing fish. It is, of course, necessary that any Chinaman engaged in drying fish shall dispose of them, and the fact that Li Sing sells or exports his prepared product does not destroy the status he acquires under Section Two of the Act of November 3, 1893, as a "laborer." This act aims to cover Chinese who are in the exact situation of Li Sing.

Section 19 of the Immigration Act of February 5, 1917, provides:

"In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final."

The attitude and province of the courts in reviewing the decision of the Secretary of Labor is illustrated by the following cases:

Chin Yow v. United States, 208 U. S. 8. In this case, the court held that a Chinese person seeking to enter the United States is entitled to a fair hearing before the Immigration officers, and that

a Federal court has jurisdiction to determine, on habeas corpus, whether he was denied a proper hearing, and if so, to determine the merits of his case, concluding its opinion in these words:

"But unless and until it is proved to the satisfaction of the judge that a hearing, properly so called, was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

In *Low Wah Suey v. Backus*, 225 U. S. 460, the sourt states:

"A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases, the order of the executive officers within the authority of the statute is final. United States v. Ju Toy, 198 U. S. 253; Chin Yow v. United States, 208 U. S. 8; Tang Tun v. Edsell, 223 U. S. 673."

In *White v. Fong Gin Gee*, 265 Fed. 600, a case decided by Your Honors in 1920, it is stated, per Ross, Circuit Judge:

"In the present case, the firm of which the alleged father of the appellee is alleged to have been a partner was engaged in the business of buying and selling poultry and eggs at a fixed place in the town of Woodland, Yolo county. But the evidence introduced before the immigration officers, and made a part of the record before the courts as above stated, shows that practically all of his time was spent in going among the farmers in the vicinity, buying chickens and eggs, and taking them to the city of Sacramento, where he sold them to customers of the firm of which he claimed to be a member, as well as to others. The Secretary of Labor, and the subordinate officers of the Immigration Service, held that in view of those facts, and the further fact that in the testimony of the alleged father he admitted ignorance of certain business interests of the firm in which he claimed to be a partner, particularly in the matter of the ownership by it of a small ranch near Woodland, that he was not a merchant, but a mere peddler or huckster; whereas the view taken by the judge of the court below, and upon which he based his judgment discharging the appellee from imprisonment, is as follows:

" 'As I read the record in this case, the bureau does not find that the father of the detained has no interest in the Woodland store, but bases its findings that he is not a merchant on the fact that he buys and collects chickens from farmers throughout the country and sells and delivers them to customers in Sacramento. But it seems to me that, if the firm of which the father is a member is one

really dealing in poultry and eggs, receiving orders for such and sending the father out to procure and deliver them, this does not make him a peddler within the meaning of the law, even though on his trips he does occasionally solicit eggs and poultry from farmers in the first instance, or look for an occasional purchaser at Sacramento for his surplus supply.'

"It is not and could not be successfully claimed for the appellee that he was not accorded a fair hearing before the officers of the Immigration Service, for the record shows that he was afforded every opportunity to introduce all available testimony and evidence; the case being twice reopened for that purpose, and ample opportunity given counsel for argument in his behalf. From the evidence, and in the light of such argument, the Secretary of Labor decided the fact to be that the appellee's alleged father was not a merchant, but a mere peddler or huckster, and we are of the opinion that his decision of such fact, even if wrong, is conclusive under the above-quoted clause of the act of Congress of February 5, 1917, and under the decisions of the Supreme Court that have been cited.

"The order and judgment of the court below are reversed, with instructions to dismiss the writ of habeas corpus."

In *Chan Gai Jan v. White*, 266 Fed. 869, a Ninth Circuit case decided in 1920, Your Honors stated:

"Based upon the testimony, of which the foregoing recounts the salient features, the question was presented to the Department of Labor to de-

termine whether Chan Moy was a merchant or a laborer, within the intendment of the Chinese exclusion legislation. We can only determine whether the Department of Labor has exceeded its authority, or has misinterpreted the law, in arriving at the conclusion reached by its decision. If there is competent evidence of persuasive character to sustain its findings, its judgment is final and conclusive, and is not susceptible of review or revision by the courts. This latter proposition is now so well established as to need no citation of authorities."

Further citations, to the effect that Li Sing's participation in the laundry business and in the manual labor involved therein, disqualify him as a merchant, are as follows:

Mar Bin Guey v. U. S., 97 Fed. 576;

Lew Quen Wo v. U. S., 184 Fed. 685;

Lai Moy v. U. S., 66 Fed. 955.

It is therefore submitted that the petitioner, Mon Hin, does not come within any exemption allowed by statute or by judicial construction, and is, therefore, excluded as a Chinese laborer under the Chinese Exclusion Laws. Further, that if the status of his stepfather, Li Sing, becomes pertinent to the inquiry, the decision of the Board of Special Inquiry and of the Secretary of Labor's Board of

Review, to the effect that Li Sing is a laborer, and not a merchant, is final and conclusive, since the petitioner was accorded a fair trial, and the record is entirely free from any arbitrary action upon the part of the Immigration officials.

Respectfully submitted,

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